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Supreme Court of the United States

October Term, 1977
No. 76-5729

MARK DAVID OLIPHANT AND DANIEL B. BELGARDE,
Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, WASHINGTON, AND MAKAH INDIAN TRIBE OF THE MAKAH INDIAN RESERVATION, WASHINGTON

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SUBJECT INDEX

Page

Interest of *Amici Curiae* 1

Summary of Argument 5

Argument 6

1. The Intent of Congress Governs the Meaning of Public Law 280 6
2. The Terms of Consent by Congress to State Assumption of Indian Jurisdiction Required Amendment of the Washington Constitution 9
   - A. Conditional Amendment of the Enabling Act.... 17
   - B. Consent to Amendment of State Constitution 19
3. Whether Washington Has Validly Assumed Indian Jurisdiction Is a Federal Question 23
4. States Are Not Free to Assume Indian Jurisdiction Except Upon Strict Compliance With Public Law 280 27
5. Washington's Assumption of Partial Indian Jurisdiction Violates Public Law 280 29
6. Washington's Assumption of Partial Indian Jurisdiction Within a Single Reservation Violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment 32
7. Washington's Assumption of Partial Indian Jurisdiction Unconstitutionally Subjects Indians to Differing Degrees of Civil Jurisdiction and Is Void for Vagueness 34
8. Washington's Assumption of Indian Jurisdiction Violates the Federal Policy Implicit in the Enabling Act and Public Law 280 Implementing the Trust Responsibility of the United States 37
9. Washington's Assumption of Partial Indian Jurisdiction Violates Federal Policy by Creating a Checkerboard Pattern of Jurisdiction on Washington Indian Reservations 42

TABLES OF AUTHORITY

Table of Cases

Page

Bryan v. Itasca County, Minnesota, 426 U.S. 373, 48 L. E. 2d 710 (1976) 25

Confederated Bands & Tribes of the Yakima Indian Nation v. State of Washington, 550 F.2d 443 (9th Cir. 1977) 27, 29, 30, 37, 41

Confederated Bands & Tribes of the Yakima Indian Nation v. State of Washington, 552 F.2d 1332 (9th Cir. 1977) 33, 34, 41

Connally v. General Construction Co., 269 U.S. 385 (1925) 35

Draper v. United States, 164 U.S. 240, 41 L. Ed. 419, 17 S. Ct. 107 (1896) 12

Dyer v. Sims, 341 U.S. 22, 95 L. Ed. 713, 71 S. Ct. 557 (1951) 26

Galvan v. Press, 347 U.S. 522, 98 L. Ed. 911, 74 S. Ct. 737 (1954) 8

Harrison v. Northern Trust, 317 U.S. 476, 87 L. Ed. 407, 63 S. Ct. 361 (1943) 8

Helvering v. Griffiths, 318 U.S. 371, 87 L. Ed. 843, 63 S. Ct. 636 (1943) 8

Jones v. Guaranty & Indemnity Co., 101 U.S. 622, 25 L. Ed. 1030 (1879) 7

Kennerly v. District Court of the Ninth Judicial District of Montana, 400 U.S. 423, 27 L. Ed. 2d 507, 91 S. Ct. 480 (1971) 25, 27, 40

Lanzetta v. New Jersey, 306 U.S. 451 (1938) 35

Leser v. Garnett, 258 U.S. 130, 66 L. Ed. 505, 42 S. Ct. 217 (1922) 23, 24

Makah Indian Tribe v. Clallam County, 73 Wn.2d 677, 440 P.2d 442 (1968) 36

Page

Makah Indian Tribe v. State, 76 Wn.2d 485, 457 P.2d 590 (1969) *appeal dismissed*, 397 U.S. 316, 25 L. Ed. 2d 335, 90 S. Ct. 1115 (1970) 40-41

Maryland v. Wirtz, 392 U.S. 183, 20 L. Ed. 2d 1020, 188 S. Ct. 2017 (1968) 28, 29

McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973) 25, 28, 29

Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976) 25, 37, 42-44

National Association of Letter Carriers v. U.S. Civil Service Commission, 341 F. Supp. 370 (U.S.D.C. Dist. Col. 1972) *judgment affirmed*, 409 U.S. 808, 93 S. Ct. 67, 34 L. Ed. 2d 62 36

Omaha Tribe of Nebraska v. Village of Walthill, 334 F. Supp. 823 (D. Nebr. 1971) 23

Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) 35

Parden v. Terminal Ry., 377 U.S. 184, 12 L. Ed. 2d 233, 84 S. Ct. 1207, *reh. denied*, **377 U.S. 1010**, 12 L. Ed. 2d 1057, 84 S. Ct. 1903 (1964) 25

Petty v. Tennessee-Missouri Bridge Co., 359 U.S. 275, 3 L. Ed. 2d 804, 79 S. Ct. 785 (1959).. 26

Quinault Tribe of Indians v. Gallagher, 368 F.2d 655 (9th Cir. 1966) *cert. denied*, 387 U.S. 907, 18 L. Ed. 2d 626, 87 S. Ct. 1684 (1967) 24-25, 41

Santa Rosa v. Kings County, 532 F.2d 655 (1975) *cert. denied*, Jan. 10, 1977, ... U.S. 38-39

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 95 L. Ed. 1035, 71 S. Ct. 745 (1951).... 8

Singer v. United States, 323 U.S. 338, 89 L. Ed. 285, 65 S. Ct. 2182 (1945) 8

Supreme Investment Corp. v. United States, 468 F.2d 370 (5th Cir. 1972) 8

	Page
The Kansas Indians, 72 U.S. (5 Wall.) 737, 18 L. Ed. 667 (1866)	10
The New York Indians, 72 U.S. (5 Wall.) 737, 18 L. E. Ed. 708 (1866)	10
Tonasket v. State of Washington, No. 71-1031	14
Tonasket v. State of Washington, 84 Wn.2d 164, 525 P.2d 744 (1974)	23, 28
United States v. American Trucking Ass'n, Inc., 310 U.S. 534, 84 L. Ed. 1345, 60 S. Ct. 1059 (1940)	7
United States v. Brown, 334 F. Supp. 536 (D. Nebr. 1971)	23
United States v. CIO, 335 U.S. 106, 92 L. Ed. 1849, 68 S. Ct. 1349 (1948)	8
United States v. Cooper Corp., 312 U.S. 600, 85 L. Ed. 1071, 61 S. Ct. 742 (1941)	7
United States v. Kagama, 118 U.S. 375, 30 L. Ed. 228, 6 S. Ct. 1109 (1886)	37-38
United States v. Landram, 118 U.S. 81, 30 L. Ed. 58, 6 S. Ct. 954 (1886)	7-8, 22
Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832)	9

Constitutional Provisions

Ariz. Const. art. 20	28
U.S. Const. art. I, §8, cl. 3	26
U.S. Const. amend. XIV	4, 6, 33, 35, 41
Wash. Const. art. 26 §2	4, 23, 24, 29

Statutes

Indian Civil Rights Act of 1968	25, 42
Laws of 1957, Ch. 240 (RCW Ch. 37.12)	3, 4
Laws of 1963, Ch. 36 (RCW Ch. 37.12)	3, 4, 35

	Page
North Dakota Revised Code 57-0208	22
Oklahoma Statutes Annotated 68 §15.2 (1945)	22
Public Law 83-280, 67 Stat. 588	1, 2, 3, 4, 5, 6, *et seq.*
Public Law 85-612, 72 Stat. 545	29
Public Law 90-284 (Civil Rights Act of 1968, 25 U.S.C. §§1301-1302, §§1321-1326)	30
South Dakota Compiled Laws §5048-53 (1929)	22
RCW 9A.12.010	32
RCW 9A.32.030	32
RCW 9A.32.040	32
RCW Title 26	36
RCW 37.12.010	36
4 Stat. 729 (Indian Trade & Intercourse Act)	10
24 Stat. 389 (General Allotment Act of 1887)	12, 42
25 Stat. 676 §4 (Washington Enabling Act)	4, 5, 11, 12, 13, 18 *et seq.*
48 Stat. 984 (Indian Reorganization Act of June 18, 1934)	12
18 U.S.C. §1111	32
18 U.S.C. §1153	32
18 U.S.C. §1162	4, 30
25 U.S.C. §1322	31
25 U.S.C. §1324	28
28 U.S.C. §1360	4, 30, 31

Other Authority

AGO 63-64, No. 68 (Nov. 8, 1963)	2
American Indian Policy Review Commission, *Final Report On Federal, State and Tribal Jurisdiction*, July, 1976, p. 15	2

Page

114 Cong. Rec. 9615 (1968) 25, 31

Cong. Rec. 10782, August 1, 1953 ..... 16, 17

34 Fed. Reg. 14288 (Sept. 11, 1969) 41

37 Fed. Reg. 7353 (April 5, 1972) 41

Hearings on Constitutional Rights of the American Indian, Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st Sess., Part 1 (1961), 87th Cong., 1st Sess., Part 2 (1961) 87th Cong., 2d Sess., Part 3 (1962), 88th Cong., 1st Sess., Part 4 (1963) 41

Hearing on H.R. 1063 Before the Committee on Interior and Insular Affairs, House of Representatives, 83rd Cong., 1st Sess. (July 15, 1953) ..... 14-15, 17, 18, 19-20, *et seq.*

Hearing on H.R. 1063 Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, House of Representatives, 83d Cong., 1st Sess. (June 29, 1953) 14, 20-21, 25, 27, 40

Hearings on Rights of Members of Indian Tribes Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 90th Cong., 2d Sess. (1968) 41

Hearings on S. 1 and S. 14 (Reform of the Federal Criminal Laws) Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 93rd Cong., 1st Sess., Part VII pp. 5888-5900 (1973) 2

Hearings on S.J. Res. 40 to Protect the Constitutional Rights of the American Indian, Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (1965) 41

Hearings on Title II of the Civil Rights Act of 1968, Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. (1969) 41

H. Rep. No. 474, 23d Cong., 1st Sess. at 1-2, 10 (1834) 10

Page

H. Rep. No. 709, 50th Cong., 1st Sess. at 24, Adverse Report to Accompany H.R. 1679 (Feb. 24, 1888) 11

H. Rep. No. 1025, 50th Cong., 1st Sess. at 8, 9 (March 13, 1888) 10-11

H.R. 1063 ..... 9, 13

LeFave and Scott, *Criminal Law*, p. 275 33

Montana-North Dakota-South Dakota Joint Advisory Committee to the United States Commission on Civil Rights, Indian Civil Rights Issues in Montana, North Dakota, and South Dakota (Aug. 1974) 42

Senate Report No. 699, U.S. Code Cong. & Ad. News, 1953, 83rd Cong. 9, 16, 39

State of Washington, Comprehensive Plan for Law Enforcement and the Administration of Justice, January 1—December 31, 1973 2

34 Yale L.J. 694 26

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INTEREST OF *AMICI CURIAE*

The *amici* are recognized Indian tribes whose reservations are located within the State of Washington. The Colville Confederated Tribes are subject to total state civil and criminal jurisdiction by reason of Public Law 83-280 (67 Stat. 588). The Makah Indian Tribe is subject to partial state civil and criminal jurisdiction by reason of Public Law 280. Both Tribes have completely equipped and effi-

ciently functioning law and order systems, each predicated upon a federally approved Law and Order Code and enforced by a staff of trained tribal police officers and a tribal court.

Both Tribes attempted unsuccessfully for many years to obtain law and order enforcement from state and county officials before abandoning their efforts altogether and concentrating instead upon strengthening their tribal law and order systems.[1] The failure of state law enforcement on Indian reservations is admitted by the State of Washington.[2]

The radical position of the State of Washington set forth in the Brief for *Amicus Curiae* Attorney General, State of Washington, that Washington's civil and criminal Indian jurisdiction assumed pursuant to Public Law 280 is exclusive of tribal jurisdiction would, if upheld, seriously damage tribal efforts to provide law and order for all citizens and property located within their Reservations. The state's legal position, reflected in Washington Attorney General Opinion, AGO 63-64, No. 68 (November 8, 1963), necessitates this brief on behalf of the two *amici* Indian tribes.

Prior to 1953, the United States and the tribes themselves exercised exclusive jurisdiction over the Indian tribes and Indian reservations in the State of Washington.

1. American Indian Policy Review Commission, *Final Report On Federal, State and Tribal Jurisdiction*, July, 1976, p. 15; Hearings on S. 1 and S. 14 (Reform of the Federal Criminal Laws) Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 93rd Cong., 1st Sess., Part VII, pp. 5888-5900 (1973).

2. 'Although the State assumed jurisdiction over major crimes and juvenile delinquency on reservations, counties have not been provided with resources to effectively assume the responsibilities of patrol, apprehension and investigation of offenses commited on reservations . . .' State of Washington, Comprehensive Plan for Law Enforcement and the Administration of Justice, January 1–December 31, 1973, at 109.

In 1953 Congress enacted Public Law 280 to provide for state assumption of Indian jurisdiction. The Act gave California, Minnesota, Nebraska, Oregon and Wisconsin, known as the "mandatory" states, complete civil and criminal Indian jurisdiction. Section 6 of the Act gave an additional eight states, including Washington, known as the "option" states, the power to assume civil and criminal Indian jurisdiction upon removal of state constitutional impediments. Each of those eight states has a constitution disclaimer of Indian jurisdiction required by its enabling act as a condition of statehood. Finally, §7 of the Act gave the remaining 15 or 18 states with Indian populations, also known as "option" states, the power to assume civil and criminal Indian jurisdiction by state legislative action.

In 1957, the Washington legislature enacted Chapter 240, Laws of 1957 (RCW Ch. 37.12) which allowed Indians to request state assumption of civil and criminal Indian jurisdiction through gubernatorial proclamation. In 1963, the Washington legislature amended the assumption statute in Chapter 36, Laws of 1963 (RCW Ch. 37.12) by dividing Indian jurisdiction into two broad categories: (1) jurisdiction assumed with tribal consent, and (2) jurisdiction assumed without tribal consent.

The first category provided for state assumption of total civil and criminal jurisdiction in the reservation of any tribe requesting the gubernatorial proclamation. But as to non-consenting tribes, the state assumed total civil and criminal jurisdiction on fee land, but jurisdiction limited to eight subject matter categories on trust land: compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption pro-

ceedings, dependent children, and operation of motor vehicles upon the public streets, alleys, roads and highways.

In summary, Washington's partial assumption scheme involves multiple partial assumptions: (1) assumption of jurisdiction of fewer than all Indians, tribes and reservations; (2) partial territorial assumption within a single reservation; and (3) partial subject matter assumption within a single reservation. In both the 1957 and 1963 Acts, the legislature assumed civil and criminal Indian jurisdiction in the foregoing complex, partial and checkerboard fashion without amendment of the state constitution to remove the disclaimer provision.

Washington's assumption of Indian jurisdiction is invalid since it violates 25 Stat. 676, §4 (the Washington Enabling Act) and Public Law 83-280 (67 Stat. 588), 18 U.S.C. §1162; 28 U.S.C. §1360. Additionally, it violates art. 26, Section Second of the Washington constitution. Finally, it is unconstitutional in that it violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Constitution.

Because of the extreme legal complexity of Washington's Indian jurisdiction, it is necessary that this Court first consider the legislative history of Public Law 280 and the manner in which Congress proceeded in its enactment before considering the invalidity of Washington's peculiar checkerboard pattern of Indian jurisdiction and its far-reaching constitutional ramifications.

SUMMARY OF ARGUMENT

Public Law 83-280 must be construed upon the basis of Congressional intent. Proper interpretation of Public Law 280, utilizing all of the rules of construction enunciated by this Court, leads to the conclusion that §6 of the Act applies to the state of Washington and requires that the state remove its constitutional disclaimer as a necessary prerequisite to assumption of *any* civil and criminal Indian jurisdiction. Determination of the triggering event to state assumption of Indian jurisdiction pursuant to Public Law 280 is a federal question to be determined by the federal courts. Since Washington failed to eliminate its constitutional disclaimer, its assumption of any civil and criminal Indian jurisdiction violates the Enabling Act, (25 Stat. 676, §4) and Public Law 280.

Public Law 280 did not authorize Washington to assume *partial* civil and criminal Indian jurisdiction, whereas its amendment, the Indian Civil Rights Act of 1968, made such authorization explicit. Under that statute, however, the consent of the Indian people was a necessary prerequisite to the assumption of jurisdiction. Even under Public Law 280 as originally enacted some protection was provided for the Indians since a constitutional amendment was required to remove the impediment to jurisdiction. Washington's assumption of partial civil and criminal Indian jurisdiction violates the federal policy implicit in the Enabling Act and Public Law 280 implementing the trust responsibility of the United States since the state statute assumes Indian jurisdiction without the constitutional amendment by the people of the state. Thus the statute attempts to circumvent a protection for the Indians which Congress carefully included both in the Enabling Act and in Public Law 280.

In addition, Washington's peculiar checkerboard pattern of Indian jurisdiction violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment since the application of state criminal law depends upon the status of the land upon which a crime is committed by an Indian. Similarly, the Washington statute is unconstitutional since it subjects Indians to differing degrees of civil jurisdiction depending upon the status of the land upon which an act occurs. Moreover, the Washington statute is void for vagueness because the eight categories of civil jurisdiction are undefined.

Finally, the state's peculiar checkerboard pattern of Indian jurisdiction violates federal Indian policy by saddling Washington Indians with an unworkable checkerboard jurisdictional scheme.

ARGUMENT

1. The Intent of Congress Governs the Meaning of Public Law 280.

This jurisdiction issue hinges upon a construction of Public Law 280 and its application to states choosing to assume Indian jurisdiction under its provisions. In turn, a proper construction of Public Law 280 hinges upon ascertainment of congressional intent in its enactment.

Indeed, the answers to two simple questions should determine the outcome of the issue. The two questions are: Does §6 or §7 of Public Law 280 apply to the State of Washington? What is the meaning of the applicable section?

The answers to these two simple questions are not so simple. But, fortunately, they are reached by a well-chart-

ed path with adequate signposts established by this Court.

Simply stated, Public Law 280 means what Congress intended it to mean. As held by this Court in *Jones v. Guaranty & Indemnity Company*, 101 U.S. 622, 25 L.Ed. 1030 (1879).

> . . . The intent of the law-maker is the law. *The People v. Utica Insurance Company*, 15 Johns (N.Y.) 357; *United States v. Babbit*, 1 Black. 55.

101 U.S. at 626.

The role of this Court in determining that intent is succinctly stated in *United States v. Cooper Corporation*, 312 U.S. 600, 85 L. Ed. 1071, 61 S. Ct. 742 (1941) at 606.

> . . . Our function ends with the endeavor to ascertain from the words used, construed in light of the relevant material, what was in fact the intent of Congress.

and again in *United States v. American Trucking Association, Inc.*, 310 U.S. 534, 84 L. Ed. 1345, 60 S. Ct. 1059 (1940).

> In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress.

310 U.S. at 542.

In approaching its function of ascertaining Congress' intent in enacting Public Law 280, this Court must be guided by the maxim requiring that a statute be construed so as to give meaning to each section.

> . . . It is a settled rule of construction that 'one part of a statute must be so construed by another that the whole may, if possible, stand; *ut res magis valeat quam pereat;*' 1 Bl.Com. 89; or, as otherwise expressed, that every clause in a statute should have effect, and one portion should not be placed in antagonism to another. *Brooks v. Mobile School Board*, 31 Ala. 227.

United States v. Landram, 118 U.S. 81 at 85, 30 L. Ed. 58 at 60, 6 S. Ct. 954 (1886).

And at the same time this Court must observe the corollary maxim of avoiding redundancies.

> . . . Such a result would be contrary to the well-established principle of statutory construction that, where another interpretation is permissible, courts will not construe a statute to make it redundant, absent a clear legislative purpose to the contrary.

Supreme Investment Corporation v. United States, 468 F.2d 370, 381 (5th Cir. 1972); *Singer v. United States*, 323 U.S. 338, 89 L. Ed. 285, 65 S. Ct. 282 (1945).

Just what is the "relevant material" that this Court must look to in finding congressional intent? Relevant material includes informed congressional discussion, *United States v. CIO*, 335 U.S. 106, 92 L. Ed. 1849, 68 S. Ct. 1349 (1948), reports of legislative committees, *Harrison v. Northern Trust*, 317 U.S. 476, 87 L. Ed. 407, 63 S. Ct. 361 (1943), legal opinions relied upon by bill sponsors and congressional committees, *Helvering v. Griffiths*, 318 U.S. 371, 87 L. Ed. 843, 63 S. Ct. 636 (1943), and memoranda inserted into the Congressional Record, *Galvan v. Press*, 347 U.S. 522, 98 L. Ed. 911, 74 S. Ct. 737 (1954).

As a general rule.

> . . . It is the sponsors that we look to when the meaning of the statutory words is in doubt.

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 at 394-5, 95 L. Ed. 1035, 71 S. Ct. 745 at 750 (1951).

2. The Terms of Consent by Congress to State Assumption of Indian Jurisdiction Required Amendment of the Washington Constitution.

Keeping the applicable rules of statutory construction firmly in mind, this Court must now examine the legislative history of Public Law 280. The law was not enacted in a vacuum, but was one of many pieces of legislation considered by the 83rd Congress which strongly supported termination of Indian tribes. An examination of Senate Report No. 699[3] which accompanied H.R. 1063 reveals that in the midst of termination bills and other measures in five distinct areas of legislation, Public Law 280 was narrowly tailored to meet only two legislative purposes, namely, to extend state criminal laws to Indian country and to make provision for state courts to adjudicate civil controversies affecting Indians arising in Indian country.[4]

The original bill, introduced by Congressman Norris Poulson of California, was originally drafted for California alone. But the Department of the Interior recommended that it be recast as a prototype bill allowing all states to assume Indian jurisdiction upon compliance with its provisions. The attempt led head on into a snarl of constitutional complexity. The difficulty lay in Supreme Court decisions and congressional acts in response to those decisions prohibiting state jurisdiction in Indian country.

Beginning with *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832), this Court had held that until Indian title to Indian country was extinguished, (1) Indian country remained completely separate and apart from states whose laws could not be applied *extraterritorially*

3. U.S. Code Cong. & Ad. News, 1953, 83d Cong. at 2409.
4. *Id.* at 2411.

inside the reservations, and (2) attempts to assert state jurisdiction over Indian country invaded the exclusive power of the United States to regulate Indian commerce. In the Indian Trade & Intercourse Act, 4 Stat. 729, Congress defined "Indian Country" as land to which Indian title had not been extinguished, including Indian lands within states and *outside* states.[5]

In *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 18 L.Ed. 667, 673, 674 (1866), this Court affirmed Worcester and in a companion case, *The New York Indians*, 72 U.S. (5 Wall.) 761, 18 L.Ed. 708 (1866), this Court extended the doctrine to the thirteen original states. The significance of *The New York Indians* is that the Supreme Court's prohibition of state jurisdiction on Indian reservations is shown to be *independent* of state enabling acts.

To summarize, in 1888, the date of congressional debate upon the Enabling Act for Washington, Montana, and the Dakotas, state Indian jurisdiction was prohibited (1) by this Court until Indian title was extinguished and (2) by Congress under its exclusive Indian commerce power.

Congressmen drafting and debating the Enabling Act were perfectly aware of both distinct prohibitions, and in explanation of the provision for disclaimer of Indian jurisdiction, the House Committee on Territories reported:

> Your committee desires to call attention to the fact that there are in the Territory of Dakota [and also in Washington] large Indian reservations, *which by the terms of the bill are excluded from the jurisdiction of the proposed state. . .*
>
> . . . In view of the fact these Indian lands are not open to settlement, and are not subject to taxation, and remain within the exclusive control and jurisdiction of

5. H. Rep. No. 474, 23d Cong., 1st Sess. at 1-2, 10 (1834).

> the United States, *the area of Dakota upon which the State government can operate is reduced to 70,000,000 of acres*—a less area than that of the State of Nevada.

(Emphasis added.) H. Rep. No. 1025, 50th Cong., 1st Sess. at 8, 9 (March 13, 1888).

In the earlier bill upon which the Committee on Territories had rendered an adverse report, the characterization of the effect of a disclaimer clause was the same.

> . . . Another reason for opposing a division of Dakota, as provided in the pending bill, is found in the fact that there are in that Territory at this time nine Indian reservations [and some in Washington], *the jurisdiction over which is reserved to the United States, and excluded from the Territory and from the proposed State, so long as the Indian titles exist*. The State can not tax the lands in these reservations, or derive any advantages from them. . .

(Emphasis added.) H. Rep. No. 709, 50th Cong., 1st Sess., at 24, Adverse Report to Accompany H.R. 1679 (Feb. 24, 1888).

As enacted, the Enabling Act provides in §4:

> . . . And said conventions shall provide, by ordinances irrevocable without the consent of the United States and the *people* of said States:
>
> . . .
>
> Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that *until the title thereto shall have been extinguished by the United States*, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . .

(Emphasis added.)

The cornerstone to understanding Congress' intent in the Enabling Act and later in Public Law 280 is recognizing that the "consent of the United States" to assumption of Indian jurisdiction contemplated in the Enabling Act was predicated upon a *previous* extinguishment of Indian title which the General Allotment Act of 1887, 24 Stat. 389, was specifically designed to effect. In *Draper v. United States*, 164 U.S. 240, 41 L.Ed. 419, 17 S.Ct. 107 (1896), this Court recognized §6 of the General Allotment Act as contemplating ". . . the gradual extinction of Indian reservations and Indian titles," and further held:

> . . . From these enactments [referring to the Enabling Act and the General Allotment Act] it clearly follows that at the time of the admission of Montana into the Union, and the use in the Enabling Act of the restrictive words here relied upon, *there was a condition of things provided for by the state law of the United States*, and contemplated to arise where the reservation of jurisdiction and control over the Indian lands would become essential to prevent any implication of the power of the State to frustrate the limitations imposed by the laws of the United States upon the title of lands once in an Indian reservation, but which had become extinct by allotment in severalty, and in which contingency the Indians themselves would have passed under the authority and control of the State.

(Emphasis added.) 164 U.S. at 246.

But history cannot be foretold. The allotment system was dismantled in the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, and successive federal statutes have continued the trust status of tribal and allotted Indian lands. Indian title has not been extinguished.

Another problem, of equal significance, is that the ordinance called for in §4 of the Enabling Act was, by the

terms of the Act, incorporated into the Constitutions of Washington, Montana, and the Dakotas, and similar ones were incorporated into the Constitutions of Arizona, New Mexico, Oklahoma, and Utah. But since the consent of "the people of said States" was a necessary prerequisite to state assumption of Indian jurisdiction under the various enabling acts, and since each state constitution could only be changed through its amendatory procedure, the 93rd Congress was aware that amendments to those eight state constitutions were necessitated by the enabling acts and the state constitutions.

The difficulty which confronted Congress in 1953, then, lay in part in its desire to consent to state assumption of Indian jurisdiction *without* extinguishment of Indian title, and in part in the necessity of amendment of state constitutions for eight of the 26 states under consideration.

The constitutional maze through which Congress had to thread its way required *in the minds of the Congressmen involved* that the United States give an *altered* consent, one not contemplated in the Enabling Act, but one admirably crafted to achieve Congress' aim through provision for amendment of state constitutions and the unusual device of simultaneous but *conditional* amendment of the enabling acts.

Fortunately, the precise constitutional thinking of the Committee on Interior and Insular Affairs of the House of Representatives which shaped Public Law 280 is available to illumine for this Court the step by step evolution of the Act. Reprints of two previously unpublished reports of hearings on H.R. 1063 have been obtained from the Na-

tional Archives and are being filed with the Court with this Brief.[6]

The evolution of §6 and §7 of Public Law 280 can best be ascertained from the informed congressional discussion in the Committee Hearing. Mr. Abbott, counsel to the committee, first stated:

> . . . The bill does not, as acted upon by the committee make provision for eight states which have constitutional organic impediments for accepting state jurisdiction. The enabling act for Arizona, Montana, New Mexico, North Dakota, South Dakota, Oklahoma, Utah, and *Washington* provided that exclusive Federal jurisdiction would be retained.
>
> The Indian Bureau in listing states pointed out that those eight states now have organic law impediments in their constitutions or other laws which would not enable them to take on state jurisdiction. . .
>
> . . .
>
> I have handed to Mr. Young a proposed amendment which would provide for the granting of consent to states having organic law impediments. At such time as they remove those impediments by action [sic] the people in the state, they could then take over the exclusive civil and criminal jurisdiction over Indians and Indian matters.
>
> In addition, Mr. Westland's state [Washington], which is one state which has a constitutional impediment, the one section provides for removal by the state of constitutional impediments. The other section would apply to any other of the 15 Indian states, so that they by affirmative legislative action could assume either criminal or civil jurisdiction, or both, at

6. *Hearing on H.R. 1063 Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, House of Representatives,* 83rd Cong., 1st Sess. (June 29, 1953); *Hearing on H.R.* 1063 *Before the Committee on Interior and Insular Affairs, House of Representatives,* 83rd Cong., 1st Sess. (July 15, 1953). Copies of the original typewritten hearings were filed by the United States with this Court in *Tonasket v. State of Washington,* No. 71-1031.

> such time as the matter were laid before the legislative bodies.
>
> In short the legislation as acted upon by the committee would apply to only five states. The two additional section amendments would apply *first to the eight states having constitutional or organic law impediments* and would grant consent of the United States for them to remove such impediments and thus acquire jurisdiction.
>
> The other amendment would apply to any other Indian state, some 15 or 18, who would acquire jurisdiction at such time as the legislative body affirmatively indicated their desire to so assume jurisdiction.

(Emphasis added). Committee Hearing on H.R. 1063, p. 2-3, (Page 23, Printed Copy).

So we see that in order to allow the bill to operate nationwide, the legal analysts who generalized the bill recognized that amendments would have to be made to provide for differing legal problems in two distinct sets of states.

The two amendments which solve the two problems just discussed have sharply contrasting language:

> Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided,* That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.
>
> Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act,

> to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Public Law 280, 67 Stat. 588 at 590.

Mr. Abbott's bald statement that §6 *and not* §7 governs Washington, makes Congress' intent very clear. But the matter doesn't end there. The conclusion is bolstered in the Senate and House Committee Reports on H.R. 1063 which read in part:

> Your committee has amended the printed bill by adopting substitute language which operates to—
>
> . . .
>
> (2) give consent of the United States to those States presently having organic laws expressly disclaiming jurisdiction to acquire jurisdiction subsequent to enactment *by amending or repealing such disclaimer laws.*
>
> Examination of the Federal statutes and State constitutions has revealed that enabling acts for eight States, and in consequence the constitutions of those States contain express disclaimers of jurisdiction. Included are Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and *Washington.* Effect of the disclaimer of jurisdiction over Indian land within the borders of these States—in the absence of consent being given for future action to assume jurisdiction—*is to retain exclusive Federal jurisdiction until Indian title in such lands is extinguished; such States could under the bill as reported, proceed to amendment of their respective organic laws by proper amending procedure.*

(Emphasis added). (U.S. Code Cong. & Ad. News, 1953, 83rd Cong. at 2412; 99 Cong. Rec. 10782, August 1, 1953).

The matter is placed beyond any reasonable doubt by colloquy on the floor of the Senate:

> Mr. Case . . . It is noted that the bill refers specifically to California, Minnesota, Nebraska, Oregon and Wisconsin. It is my understanding that the bill also contains a couple of paragraphs which make it possible for States which by their compacts with the United States, or, in some cases, their constitutions, ceded jurisdiction with respect to Indian lands to the United States, *to amend their constitutions so as to come under the* provisions of the bill. I have in mind, of course, particularly the situation in South Dakota [and Washington under the identical enabling act]. I understand that the same situation obtains in Montana, North Dakota and possibly Wyoming.
>
> . . .
>
> Mr. Barrett: Mr. President, the Senator from South Dakota is correct.

(Emphasis added). 99 Cong. Rec. 10782 (August 1, 1953).

Congress' intent in Public Law 280 is detailed (1) by the sponsors of the act, (2) in congressional hearings, (3) in Senate and House Reports, and (4) in Senate floor debate. *All agreed unanimously that §6 and not §7 governed Washington.* Nothing further could possibly be asked of Congress.

We now reach the second question facing this Court. What is the meaning of §6 of Public Law 280? Close analysis is necessary.

A. *Conditional Amendment of the Enabling Act*

Section 6 begins:

> Notwithstanding the provisions of any Enabling Act for the admission of a State . . .

and then grants federal consent to amendment of the constitution. The addition of the initial amendatory language is explained by colloquy in the Committee Hearing on H.R. 1063.

Mr. Berry: Mr. Chairman, I would like to ask a question. Would it not be better to word that to say that this 'shall be applicable,' instead of saying 'consent is hereby granted.' Why not say, 'The provisions of the law shall be applicable' to these states wherein they do these things.

Mr. Westland: I believe the law would then be applicable to them, once they had taken this affirmative action.

. . . .

Mr. Dawson: That brings up another question: Whether your wording should refer to the Enabling Act. You say 'We hereby give our consent for them to amend their state constitution.' Their state constitution was based upon the Enabling Act. In other words, they followed that. I wonder whether we should have something in there to say 'Notwithstanding any restrictions in the Enabling Act, consent is hereby given to amend their state constitution.'

Mr. Abbott: (Counsel) I believe that clause 'notwithstanding any provisions of the Enabling Act' for such states might well be included. *It would make clear that Congress was repealing the Enabling Act.*

Mr. Dawson: *To give permission to amend their constitution.*

Mr. Abbott: (Counsel) I think that would help clarify the *intent* of the committee at the present time and of Congress if they favorably acted on the legislation.

(Emphasis added). Committee Hearing on H.R. 1063, p. 8-9, (Page 27, Printed Copy).

When Congress did act favorably on the legislation, its intent to amend the Enabling Act for the *limited* purpose of allowing constitutional amendment became law. But it must be firmly kept in mind that the Enabling Act amendment was only *conditional* and only became operative by virtue of state constitutional amendment. The proviso to §6 underscores this conclusion.

. . . *Provided,* That the provisions of *this Act* shall not become effective . . . *until*

. . . .

(Emphasis added). 67 Stat. 588 at 590.

Bluntly put, since Washington did not amend its constitution, its Enabling Act was not amended by Public Law 280 and it could not validly assume Indian jurisdiction.

B. *Consent to Amendment of State Constitution*

After the initial amendatory language §6 continues:

. . . the consent of the United States is hereby given to the people of any State to amend, where necessary, their state constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act . . .

67 Stat. 588 at 590.

Thus, §6 gives federal consent to state assumption of Indian jurisdiction and again the proviso conditions that consent upon amendment of the constitution. That this twofold conclusion is Congress' intent is spelled out in the Committee Hearings on H.R. 1063.

Mr. Berry: Does not this make this bill applicable to all states who amend their laws under the constitution, and it greatly increases the authority of the bill.

Mr. Abbott: (Counsel) The intention was to grant it to all states at such time as they were willing to take it. The five states we have named have been consulted with by the Indian Bureau. *At any other time in the future that the state of Washington or South Dakota is able to remove their constitutional impediments, then they could so do it* . . .

Mr. Westland: I believe the state of Washington was consulted on this matter and they indicated their readiness to take over on this jurisdiction as far as

> criminal and civil was concerned, but they do have a constitution there that requires this amendment [referring to §6] in order that they can get at it.

(Emphasis added). Committee Hearing on H.R. 1063, p. 7-8, (Page 26, Printed Copy).

Then the Committee began consideration of §7 which provides Indian jurisdiction for any of the other 18 states with Indian populations.

> . . . at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the state to the assumption thereof.

67 Stat. 588 at 590.

The contrast between the language of §6 authorizing "the people of any state to amend . . . their state constitution" and that of §7 providing that "the people of the State shall, by *affirmative legislative action*" points up quite forcefully Congress' plain intent that the triggering event in §6 be a normal constitutional amendment and the triggering event in §7 be a statute enacted by the legislature. The point was driven home once and for all in the Subcommittee Hearing on H.R. 1063 at which Harry A. Sellery, Chief Counsel for the Bureau of Indian Affairs, and William R. Benge, Chief of the Branch of Law and Order of the Bureau of Indian Affairs, presented the final version of the act.

> Mr. Abbott: (Counsel to Committee) Mr. Binge informs me there are 26 states shown there as having Indian populations. You can correct it for the record, Mr. Benge, but I believe several of those states have constitutional problems against jurisdiction.
>
> Mr. Benge: Yes, sir; that is right.
>
> Mr. Abbott: Which would mean that there would be apparently no jurisdiction.

> Mr. Benge: It would require amendment to a state constitution in most cases, on the ones that Mr. Abbott is speaking of. *The Organic Act which admitted the state to the union and the state constitution would have to be amended.* The state constitution in consequence of the Organic Act denied jurisdiction over crimes committed by Indians on their reservations. *To meet that the State Legislature would* have to amend the constitution.
>
> I take it that a general bill like this would be regarded as authority by Congress for them to amend their constitutions. It would be regarded as an amendment to the Organic Act.
>
> Mr. Aspinall: *The State Legislature would not do it. The people of the state themselves would have to do it.*
>
> Mr. Benge: Yes, sir.

(Emphasis added). Subcommittee Hearing on H.R. 1063, p. 23-24, (Page 17, Printed Copy).

There it is in a nutshell. Nothing could demonstrate more effectively Congress' intent that §6 authorizes Washington to assume Indian jurisdiction not by legislative action but only conditionally upon amendment of the constitution.

One difficulty remains, however. Section 6 of Public Law 280 authorizes amendment of the constitution "or existing statutes . . ." Does that not mean that simple legislative action without constitutional amendment is alternatively authorized by §6 for Washington? Are §6 and §7 interchangeable in some cases?

Such an interpretation will not do. First, it would make §6 and §7 equivalent, and therefore, §7 totally redundant in blatant violation of the maxim of avoiding redundan-

cies. Second, not only is another reasonable interpretation permissible, *United States v. Landram,* 118 U.S. 81, 30 L.Ed. 58, 6 S.Ct. 954 (1886) it is required by clear legislative purpose to the contrary. Finally, and providentially, the very problem occurred to Congressman Wesley A. D'Ewart of Montana during committee deliberations.

> Mr. Westland: This amendment would insert two new sections. First is section 6, which says: 'The consent of the United States is hereby given to the people of any state to amend where necessary their state constitutions or existing statutes, . . .'
>
> Mr. D'Ewart: *I do not think we have to grant permission to a state to amend its own statutes.*
>
> Mr. Abbott: (Counsel) Mr. D'Ewart, I believe *the reason for this is that in some instances it is spelled out both in the constitution and the statutory provisions as a result of the Act [the enabling act] and it may be unnecessary, but by some state courts it may be interpreted as being necessary.*

(Emphasis added). Committee Hearing on H.R. 1063, p. 6-7 (Page 25, Printed Copy).

The grant of permission to amend statutes in §6, then, is an extra measure of consent to states with disclaimers of Indian jurisdictions in their constitutions and in their statutes as well. Such consent to statutory amendment is intended to be *in addition to* constitutional amendment even though possibly "unnecessary," and is decidedly not intended to provide an alternative to constitutional amendment. The unusual states with statutory as well as constitutional disclaimers of Indian jurisdiction are Oklahoma,[7] North Dakota,[8] and South Dakota.[9] The extra measure of

7. Oklahoma Statutes Annotated 68 §15.2 (1945).
8. North Dakota Revised Code 57-0208.
9. South Dakota Compiled Laws §5048-53 (1929).

consent to amend statutes in §6 is limited to those three states, but is no substitute for the mandatory requirement of state constitutional amendment required of Washington.

3. Whether Washington Has Validly Assumed Indian Jurisdiction Is a Federal Question.

Determination of what action is required under §6 to trigger conditional amendment of the Enabling Act and effect Congress' consent to state assumption of Indian jurisdiction is a federal question deriving from the federal Constitution. *Leser v. Garnett,* 258 U.S. 130, 66 L.Ed. 505, 42 S.Ct. 217 (1922). Only federal interpretation of the effectiveness of the triggering event is controlling. *United States v. Brown,* 334 F.Supp. 536 (D. Nebr. 1971); *Omaha Tribe of Nebraska v. Village of Walthill,* 334 F.Supp. 823 (D. Nebr. 1971); *Leser v. Garnett, supra.* In this case, Congress' own interpretation that the triggering event be a state constitutional amendment is not only decisive, but guaranteed by the final provisio in §6.

In *Tonasket v. State,* 84 Wn.2d 164, 525 P.2d 744 (1974) (*Tonasket II*), the Washington Supreme Court predicated its upholding of Washington's assumption of Indian jurisdiction upon construction that the phrase "where necessary" in §6 transmutes the problem of sufficiency of the triggering event from a federal matter into a state matter. Once safely on its own ground, the Washington Court then construed both §4 of the Enabling Act and Const. art. 26, Section Second, as requiring only the consent of the people of the state "speaking through the legislature" to eliminate the constitutional disclaimer.

It is precisely at this point that *Tonasket II* went off the rails. The necessity of state constitutional amendment does

not derive in the first instance, from §6 of Public Law 280, but rather from §4, of the Enabling Act. But §4, and consequently the Compact in Section Second of the state constitution, require that the disclaimer of Indian jurisdiction be irrevocable without consent of the United States and "the people" of the state.

The Compact was adopted by the people of the state. Since the constitution was approved by the people pursuant to federal mandate, the Compact is between the federal government and the people and cannot be altered except upon consent of the people *speaking for themselves.* The state court begged the question by skipping lightly over the crucial distinction between the people speaking for themselves, and representational speech where the few are authorized to bind the many.

But this distinction was not missed by Congress. Indeed, Congress adverted to it in §4 of the Enabling Act when it stated "the delegates to the conventions . . . *shall declare, on behalf of the people* of said proposed States that they adopted the Constitution of the United States. . . ." This analysis alone destroys the foundation of *Tonasket II* and with it Washington's attempt to assume Indian jurisdiction. It convinced the Honorable Justices Utter and Stafford of the Washington Court who dissented in *Tonasket II* and would have held that Washington's assumption of Indian jurisdiction violates the Enabling Act, Const. art. 26, Section Second and §6 of Public Law 280. Determination of the triggering event remains a federal question and that federal question transcends any state limitations sought to be imposed upon it. *Leser v. Garnett, supra,* at 137.

In *Quinault Tribe of Indians v. Gallagher,* 368 F.2d 655

(9th Cir. 1966) (*Quinault II*) the Ninth Circuit Court held that the underlying concern of Congress in enacting Public Law 280 was not that Washington's disclaimer be removed in any particular way, but that it be removed in some way which would be valid and binding under state law before federal jurisdiction be relinquished. Relying on the Washington Court's upholding the validity of Washington's removal of its constitutional disclaimer as valid under state law, the Ninth Circuit Court upheld Washington's assumption of Indian jurisdiction as valid.

But at the time of *Quinault II* in 1966, the Ninth Circuit did not have the benefit of 7 major aids necessary to its proper construction of Public Law 280, namely (1) the Subcommittee and Committee Hearings on H.R. 1063; (2) the statement of Representative Wayne Aspinall on the floor of the House of Representatives during Congressional debates on the Indian Civil Rights Act of 1968, 114 Cong. Rec. 9615 (1968); (3) the Indian Civil Rights Act of 1968; (4) *Kennerly v. District Court of the Ninth Judicial District of Montana,* 400 U.S. 423, 27 L.Ed. 2d 507, 91 S.Ct. 480 (1971); (5) *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973); (6) *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976); (7) *Bryan v. Itasca County, Minnesota,* 426 U.S. 373, 48 L. Ed. 2d 710 (1976). Had the Ninth Circuit had these materials available, it is unlikely that it would have decided *Quinault II* as it did.

In any event, compacts are peculiarly within the domain of federal law, to be determined by this Court, even in situations in which a state supreme court attempts to con-

strue a state constitution. In *Dyer v. Sims*, 341 U.S. 22, 95 L.Ed. 713, 71 S.Ct. 557 (1951), this Court held:

> The Supreme Court of Appeals of the State of West Virginia is, *for exclusively State purposes*, the ultimate tribunal in construing the meaning of her Constitution. Two prior decisions of this Court make clear, however, that we are free to examine determinations of law by State courts in the limited field where a compact brings in issue the rights of other States and the United States.

(Emphasis added.) 341 U.S. at 28.

States who are parties to a compact, by accepting it and acting under it, assume the conditions that Congress under the Constitution attached. *Petty v. Tennessee-Missouri Bridge Co.*, 359 U.S. 275, 281, 3 L.Ed. 2d 804, 79 S.Ct. 785 (1959). The rationale is that a national and not merely a regional interest is involved and therefore Congress must exercise national supervision through its power to grant or withhold consent or to grant it under appropriate conditions.[10]

The same rationale applies to the Compact between the federal government and the people of Washington. This is especially so since Indian jurisdiction is federal in nature, having been delegated to Congress in art. I, §8, cl. 3 of the Constitution. Whenever a state leaves the sphere that is exclusively its own and enters into activities subject to Congressional regulation—such as Indian jurisdiction—it subjects itself to that Congressional regulation as fully as if it were a private person or corporation. *Parden v. Terminal Railway*, 377 U.S. 184, 196, 12 L.Ed. 2d 233, 84 S.Ct. 1207, *reh. denied*, 377 U.S. 1010, 12 L.Ed. 2d 1057, 84 S.Ct. 1903 (1964).

10. Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 694-695.

4. States Are Not Free to Assume Indian Jurisdiction Except Upon Strict Compliance With Public Law 280.

In *Kennerly, supra,* this Court rejected an attempt by Montana to assume jurisdiction over the Blackfeet Indian Reservation and its members *without enacting a statute or amending its constitution.* This Court noted that

> . . . Section 7 of that statute [Public Law 83-280] conditioned the assumption of state jurisdiction on 'affirmative legislative action' by the State. . .

400 U.S. at 427, and added

> . . . *Nor was the requirement of affirmative legislative action an idle* choice of words. . .
>
> . . . Our conclusion as to the intended governing force of §7 of the 1953 Act is reinforced by the *comprehensive and detailed congressional scrutiny* manifested in those instances where Congress has undertaken to extend the civil or criminal jurisdictions of certain States to Indian country.

400 U.S. at 427. (Emphasis added.)

In point of fact, in *Kennerly, supra,*[11] this Court mistakenly assumed that §7 applied to Montana. But this Court had no need to involve itself with the fine distinctions between §6 and §7 since Montana had not acted at all, neither amending its constitution nor enacting a statute. Clearly Montana failed to satisfy either section and this Court needed to look no further. Nor did this Court have the benefit of the then newly-discovered Subcommittee

11. It appears that this Court's mistaken reference to §7 in *Kennerly* stems from the fact that counsel for all parties mistakenly advised this Court that §7 was the pertinent section. Had the decision required a comparison between §6 and §7, the mistake would, no doubt, have been uncovered. The Ninth Circuit Court noted in *Confederated Bands and Tribes of the Yakima Indian Nation v. State of Washington*, 550 F.2d 443 (9th Cir., 1977) [hereinafter referred to as "Yakima case (1st opinion)"] p. 445, n. 3, that Washington governed by §6.

and Committee Hearings on H.R. 1063.

Besides, this Court has since corrected its misapprehension. In *McClanahan, supra,* the Supreme Court struck down Arizona's attempt to assume taxing jurisdiction over Indians residing on the Navajo Reservation without complying with Congress' detailed regulations for assuming Indian jurisdiction. Arizona has a disclaimer of Indian jurisdiction identical to Washington's, Arizona const. art. 20, but has never acted under §6 or §7 of Public Law 83-280. This Court held:

> . . . the Act expressly provides that the State must act 'with the consent of the tribe occupying the particular Indian country,' 25 U.S.C. §1322(a), . . . *and* must 'appropriately [amend its] constitution or statutes.' 25 U.S.C. §1324. Once again, the Act cannot be read as expressly conferring tax immunity upon Indians. *But we cannot believe that Congress would have required the consent of the Indians affected and the amendment of those state constitutions which prohibit the assumption of jurisdiction if the States were free to accomplish the same goal unilaterally by simple legislative enactment. See Kennerly v. District Court,* 400 U.S. 423, 27 L.Ed. 2d 507, 91 S.Ct. 480 (1971).

(Emphasis added. Footnotes omitted.) 411 U.S. at 177.

It is significant that this Court points to §1324, a reenactment of §6 of Public Law 280, as a "statutory imperative" in striking down Arizona's Indian jurisdiction. 411 U.S. at 179.

Finally, the Washington Court's distinction in *Tonasket II* between "proprietary" and "governmental" state jurisdiction on Indian reservations is altogether specious. In *Maryland v. Wirtz,* 392 U.S. 183, 20 L.Ed. 2d 1020, 88 S.Ct. 2017 (1968), this Court stated:

> In the first place, it is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character. As long ago as *Sanitary District of Chicago v. United States* . . . the Court put to rest the contention that state concerns might constitutionally 'outweigh' the importance of an otherwise valid federal statute regulating commerce.

392 U.S. at 195.

And the state court decision in *McClanahan,* in which the Arizona Court of Appeals relied on the same specious notion, was unanimously reversed by this Court.

5. Washington's Assumption of Partial Indian Jurisdiction Violates Public Law 280.

Apart from the fact that Washington's assumption of *any* Indian jurisdiction violates the Enabling Act, art. 26, § Second of the Washington Constitution and Public Law 280, it is also invalid for a completely different reason: it is partial and not total as required by Public Law 280.[12]

Public Law 280 was an all or nothing statute. In it Congress required the five[13] mandatory states to assume complete civil and criminal Indian jurisdiction and made no provision for option states such as Washington to assume anything less. The legislative history of Public Law 280 supplies no support for the conclusion that Congress intended Washington or any other state to experiment with

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12. The Ninth Circuit Court rejected this argument in the *Yakima* case (1st Opinion), *supra.* But see dissent at p. 449.

13. Alaska was added as a sixth mandatory state in 1958. Public Law 85-615, 72 Stat. 545.

partial jurisdiction.[14] If an analysis of the text and legislative history of Public Law 280 were not convincing of this point in themselves, it certainly becomes clear when the Act is considered in light of its amendment, the Indian Civil Rights Act of 1968, Public Law 90-284 (25 U.S.C. §1301-1302 and §§1321-1326).

In the new Act, future state assumption of Indian jurisdiction was provided through 25 U.S.C. §§1321 and 1322, the counterparts to the original cessions of Indian jurisdiction, 18 U.S.C. §1162 and 28 U.S.C. §1360. But the two new sections contain a striking change, best seen when they are compared with their counterparts:

THE OLD	THE NEW
18 U.S.C. §1162:	25 U.S.C. §1321:
"Each of States listed in the following table shall have jurisdiction over offenses . . . to the same extent that such State has jurisdiction . . . elsewhere within the State."	"The consent of the United States is hereby given to any State not having jurisdiction . . . to assume . . . such measure of jurisdiction over *any or all of such offenses* committed within such *Indian country or any part thereof* . . ."

14. Goldberg, "P.L. 280: The Limits of State Jurisdiction Over Reservation Lands", 222 U.C.L.A. L. Rev. 535 (1975) at 554-5. *See also Yakima* case (1st Opinion), *supra*.

THE OLD	THE NEW
28 U.S.C. §1360:	25 U.S.C. §1322:
"Each of the States listed in the following table shall have jurisdiction over . . . civil causes of action . . . to the same extent that such state has jurisdiction over other civil causes of action . . ."	"The consent of the United States is hereby given to any state not having jurisdiction over civil causes of action . . . to assume . . . such measure of jurisdiction over *any or all such civil causes of action* arising within such Indian country or any part thereof . . ." (Emphasis added).

Added to these textual changes is the explanatory statement of Representative Aspinall, who had been on the Indian Affairs Subcommittee of the House Committee on Interior and Insular Affairs at the time Public Law 280 was enacted, and who was Chairman of the Committee in 1968, that the 1968 Act:

> would substantially amend (Public Law 280) . . . by permitting states to assume partial jurisdiction over an Indian reservation.

114 Cong. Rec. 9615 (1968).

The Congressional policy underlying Public Law 280 and the fact that Congress felt it necessary in 1968 to provide explicit authority to state assumption of both *partial* subject matter Indian jurisdiction, and *partial* territorial Indian jurisdiction leads ineluctably to the conclusion that Public Law 280 itself did *not* authorize any partial Indian jurisdiction. Washington's assumption of Indian jurisdiction must fall as in violation of Public Law 280.

6. Washington's Assumption of Partial Indian Jurisdiction Within a Single Reservation Violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

It is now necessary for this Court to narrow its view and consider the *specific* legal ramifications of Washington's peculiar checkerboard pattern of Indian jurisdiction. Keeping in mind the state's claim of *exclusive* partial civil and criminal Indian jurisdiction within a single reservation, this Court should consider a specific instance: If a Makah Indian were to murder another Indian on *trust* land inside the Makah Indian Reservation in the course of the felony of rape, he would be prosecuted in federal court pursuant to 18 U.S.C. §1153, the Major Crimes Act, because the state has not assumed jurisdiction. Murder under that section is defined in 18 U.S.C. §1111 which provides for the imposition of the death penalty unless the jury lessens it to life imprisonment. But if a Makah Indian were to murder another Indian on *non-trust* land inside the Makah Indian Reservation in the course of the felony of rape, he would be prosecuted in state court pursuant to RCW 9A.-32.030 and punished pursuant to RCW 9A.32.040 which *limits* the punishment to life imprisonment. In short, the difference is a matter of life and death.

The sole basis for the disparate treatment of the two Indian defendants in the foregoing example is the status of the land on which the crime is committed. Is such discrimination between Makah Indians who commit identical crimes inside the Makah Reservation constitutional? Does subjecting only the Indian who commits murder on *trust* land to a possible death penalty serve some justifiable state governmental objective? Obviously not, for on ten

reservations in Washington state law is applicable on *both* trust and non-trust lands. And within a single reservation such as the Makah Indian Reservation, no rational reason even suggests itself in justification for the discrimination.

Consider a second invidiously discriminatory element inherent in the foregoing example: The federal Indian defendant might raise the insanity defense which, in federal court, is the "substantial capacity test", a variation of the Durham Rule. But the state Indian defendant who raised the insanity defense is faced with RCW 9A.12.010, which prescribes a variation of the M'Naughton Rule. To prove his defense the federal Indian defendant need *only* prove mental disease which prevents him from controlling his conduct even though he knows the difference between right and wrong; but the state Indian defendant must prove either that he was unable to perceive the nature and quality of the act or unable to tell the difference between right and wrong. The federal rule is widely conceded as greatly more advantageous than the state rule. LeFave and Scott, *Criminal Law*, p. 275. No possible rational reason exists why two Indians who commit identical crimes deserve different burdens of proof in the urging of the insanity defense.

In *Confederated Bands and Tribes of the Yakima Nation v. State of Washington*, 552 F.2d 1332 (9th Cir., 1977), [hereinafter referred to as the "Yakima case (2nd Opinion)"], the Ninth Circuit Court struck down Washington's assumption of partial Indian jurisdiction as in violation of the equal protection provision of the Fourteenth Amendment. Addressing itself only to the classification based on the status of title to the land upon which an al-

leged criminal offense occurs, the Ninth Circuit Court stated:

> We can detect no rational connection between the stated purpose and the distinction based on land title within the reservation. The state's interest in enforcing criminal law is no less 'fundamental' or 'overriding' on non-fee lands than on fee lands. An overriding concern with and responsibility for public order necessarily embrace both, once the state undertakes to assume any jurisdiction over either. No showing has been or can be made that the happenstance of title holding is related in any way to the need by the land occupants for law enforcement. Moreover, no relationship has been suggested or shown between the interest and the ability of the state or provide law enforcement and the fee—non-fee status of the land within the reservation. This checkerboard jurisdictional structure based on a s[illegible]tion by land title is the 'very kind of arbitrary le[illegible]ive choice forbidden by the Equal Protection Clause . . .' (*Reed v. Reed* (1971) 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225). Accordingly, the partial territorial assumption of criminal jurisdiction under RCW §37.12.010 is a denial of equal protection.

552 F.2d at 1334-1335.

7. Washington's Assumption of Partial Indian Jurisdiction Unconstitutionally Subjects Indians to Differing Degrees of Civil Jurisdiction and Is Void for Vagueness.

With respect to Washington's Indian civil jurisdiction, the same unconstitutional discrimination occurs. If a Makah Indian were to commit a tort against a non-Indian on non-trust land inside the Makah Indian Reservation, he would be sued in state court and, if he were found to have committed the tort, subject to the state's procedures for enforcing judgments. But since the state has not assumed jurisdiction over trust land inside the Makah Indian Reservation, a Makah Indian committing a tort on trust land there cannot be subjected to suit in state court. Unless the tribe has set up a tribal court with civil jurisdiction he will, as a practical matter, be immune from liabililty for his tort. RCW Ch. 37.12 sanctions this disparate treatment based solely on the status of the title to the land where the tort occurs, a consideration bearing no reasonable relation to any legitimate state governmental purpose.

Accordingly, Washington's assumption of partial Indian *civil* jurisdiction is as invidiously discriminatory as its partial Indian criminal jurisdiction and thus violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

Another feature of what Judge Hufstedler refers to in the *Yakima* case (1st Opinion), *supra*, as Washington's "truly unique checkerboarding" is that the eight categories of civil jurisdiction are so vague as to what civil and criminal matters fall within their ambit that the statute does not meet constitutional standards of definiteness. *Lanzetta v. New Jersey*, 306 U.S. 451 (1938); *Connally v. General Construction Co.*, 269 U.S. 385 (1925).

In the recent case of *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) this Court enunciated the void for vagueness rule:

> Living under a rule of law entails various suppositions, one of which is that 'all persons are entitled to be informed as to what the State commands or forbids.'

The Court went on to say that a statute must give a person of ordinary intelligence fair notice as to what conduct

is prohibited and be sufficiently specific to avoid arbitrary and erratic arrests and convictions.

Nor does RCW 37.12.010 meet the constitutional standards of definiteness through incorporation by reference. Even if these eight items were adequately referenced, they would still fail. *See National Association of Letter Carriers v. U.S. Civil Service Commission*, 341 F.Supp. 370 (U.S.D.C. Dist. Col. 1972), *judgment affirmed*, 409 U.S. 808, 93 S.Ct. 67, 34 L.Ed.2d 62 where this Court held that a Hatch Act prohibition was unconstitutionally vague and overly broad because it incorporated by reference over 3,000 rulings made by the Civil Service Commission between 1886 and 1940. Those 3,000 rulings would be a mere molehill compared to the mountain of statutes, cases, rulings, etc. that the incorporation by reference in this matter would provide.

Consider, for example, the meaning of the phrase "domestic relations" in RCW 37.12.010. At first glance, one might think that "domestic relations" would include all of RCW Title 26— Domestic Relations, including Washington community property law. However, a glance at *Makah Indian Tribe v. Clallam County*, 73 Wn.2d 677, 440 P.2d 442 (1968), reveals the confusion concerning the applicability of community property law on Indian reservations. The lack of definition of any of the eight subject matters or areas of Washington's scheme of partial jurisdiction means that no Indian on any Washington State reservation subject to partial state jurisdiction can possibly be informed as to what the state commands or forbids. Incidentally, this aspect of Washington's checkerboard Indian jurisdiction illumines the reason why an impractical pattern of checkerboard jurisdiction is discredited by

both Congress and this Court. See *Moe, supra,* at 110.

The Ninth Circuit Court in the *Yakima* case (1st Opinion), *supra,* at 448, n. 12 recognized that to determine which of Washington's eight subject matter areas is wholly civil or wholly criminal and to divide up the categories that are part civil and part criminal, would be a very difficult undertaking. Washington Indian citizens cannot constitutionally be required to guess.

8. Washington's Assumption of Indian Jurisdiction Violates the Federal Policy Implicit in the Enabling Act and Public Law 280 Implementing the Trust Responsibility of the United States.

Federal jurisdiction over crimes committed by or against Indians within reservations was upheld by this Court in *United States v. Kagama*, 118 U.S. 375, 30 L.Ed. 228, 6 S.Ct. 1109 (1886). In *Kagama*, this Court held:

> These Indians are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feelings, the people of the States where they are found are often their deadliest enemies. *From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, arises the duty of protection, and with it the power.* This has always been recognized by the Executive and by the Congress, and by this court, whenever the question has arisen.
>
> • • • •
>
> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom

> they dwell. *It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all tribes.*

(Emphasis added). 30 L.Ed. at 231.

The "duty of protection" referred to by this Court in *Kagama* is the trust responsibility of the United States toward Indian tribes and their enrolled members. Exercise of that trust responsibility is of crucial importance for the very reason that the people of the states in which Indians are found are still often their deadliest enemies.

Thus it is quite natural that three years after the *Kagama* decision Congress acted in accordance with its trust responsibility by requiring in the Enabling Act the Compact by which Washington disclaimed any Indian jurisdiction until (1) Indian title was extinguished, and (2) Congress consented to state Indian jurisdiction. And, again, it was to be expected that Congress would exercise its trust responsibility in 1953 in the enactment of Public Law 280. As stated in *Santa Rosa v. Kings County,* 532 F.2d 655 (1975) *cert. denied* Jan. 10, 1977, ... U.S. .....:

> The Federal government has long been recognized to hold, along with its plenary power to regulate Indian affairs, a trust status towards the Indian—a status accompanied by fiduciary obligations. *See Seminole Nations v. United States,* 316 U.S. 286, 297 (1942); *United States v. Kagama,* 118 U.S. 375 (1886); *Beecher v. Wetherly,* 95 U.S. 517, 525 (1877); *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 12 (1831). While there is legally nothing to prevent Congress from disregarding its trust obligations and abrogating treaties or passing laws inimical to the Indians' welfare, the courts, by interpreting ambiguous statutes in favor of Indians, *attribute to Congress an intent to exercise its plenary power in the manner most consistent with the nation's trust obligations.* See *Squire v. Capoeman,* 351 U.S. 1, 7-8 (1956).

(Emphasis added. Footnotes omitted). 532 F.2d 655, 660 (1975).

To understand the exact manner in which Congress exercised its trust responsibility "in the manner most consistent with the nation's trust obligations" in the enactment of Public Law 280, it is necessary to examine the legislative history of the Act. Senate Report No. 699[15] contains a letter from Orme Lewis, Assistant Secretary of the Interior, to Honorable A. L. Miller, Chairman, Committtee on Interior and Insular Affairs of the House of Representatives, dated July 7, 1953. In his letter, Mr. Lewis points out that the Bureau of Indian Affairs had consulted extensively "with state and local authorities and with the Indian groups" in the five mandatory states and that in each the "State and local authorities indicated their agreeableness to the proposed transfer of jurisdiction."

Elsewhere in Senate Report 699, the Committee recognized the great trust responsibility of the federal government toward Indians by stating that the attitude of the various states and Indian groups within states to be given Indian jurisdiction in the future "should be heavily weighed before effecting transfer."[16] It was precisely to protect Indians from unwanted transfers of jurisdiction to states whose non-Indian citizens who did not wish to

15. Senate Report No. 699, U.S. Code Cong. & Ad. News, 1953, 83rd Cong. at 2411-2412; 83rd Cong., 1st Sess., 99 Cong. Rec. 10782-10783 (1953).

16. *Id.*, at 2412.

fulfill their responsibility under such jurisdiction that Congress required in §6 of Public Law 280 for the simultaneous amendment of the Enabling Act and the Washington constitution. As demonstrated by the colloquy in the *Subcommittee Hearing, supra,* at p. 9, Congress understood perfectly well that the people of the State of Washington would have to amend the Washington constitution *prerequisite* to Washington's assumption of Indian jurisdiction.

As this Court said in *Kennerly*:

> . . . Nor was the requirement of affirmative legislative action an idle choice of words; the legislative history of the 1953 statute shows that the requirement was intended to assure that *state jurisdiction would not be extended until the jurisdictions to be responsible for the portion of Indian country concerned manifested by political action their willingness and ability to discharge their new responsibilities.*

(Emphasis added). 400 U.S. at 427.

But since the Washington legislature assumed Indian jurisdiction *without* amendment of the constitution, the people of the State of Washington never manifested by the political action of popular vote their willingness and ability to discharge their new responsibility. And history subsequent to Washington's assumption of Indian jurisdiction demonstrates that the people of the State of Washington are in fact unwilling and unable to discharge the responsibility of Indian jurisdiction. The failure of Washington's Indian jurisdiction *without consent of the people of the state* is beyond dispute. So appallingly unsuccessful and unequal has state jurisdiction been that three Washington tribes have attempted to have it declared invalid.[17] The

17. *Makah Indian Tribe v. State,* 76 Wn.2d 485, 457 P.2d 590

Quinault and Suquamish Indian Tribes have petitioned for retrocession of jurisdiction and partial retrocession has been accomplished.[18]

Washington Indian tribes have repeatedly but vainly sougth retrocession from the legislature. In the course of those attempts, the tribes documented the fact that state jurisdiction is one-edged sword which cuts in the direction of prosecution of Indian offenders but does not cut in the direction of protection of Indians and Indian property on reservations. Washington tribes have been frankly advised by officials of county sheriff's offices that the counties lack sufficient personnel, vehicles, equipment and funds for providing law enforcement on the reservations.

The failure of Washington's Indian jurisdiction is not unique. Hearings held by Senator Ervin's Committee on Constitutional Rights between 1961 and 1968[19] demon-

(1969) *appeal dismissed,* 397 U.S. 316, 25 L.Ed.2d 335, 90 S.Ct. 1115 (1970); *Quinault Tribe of Indians v. Gallagher,* 368 F.2d 648 (9th Cir. 1966) *cert. denied,* 387 U.S. 907, 18 L.Ed.2d 626, 87 S.Ct. 1684 (1967); *Confederated Bands and Tribes of Yakima Nation v. State,* 550 F.2d 443 (9th Cir., 1977) [1st Opinion]; 552 F.2d 1332 (9th Cir., 1977) [2nd Opinion]. In the 2nd Opinion the Ninth Circuit Court invalidated Washington's partial assumption of Indian jurisdiction as in violation of the Equal Protection Clause of the constitution.

18. 34 Fed. Reg. 14288 (Sept. 11, 1969) [Quinault]; 37 Fed. Reg. 7353 (April 5, 1972) [Suquamish]

19. *Hearings on Constitutional Rights of the American Indian, Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 87th Cong., 1st Sess., Part 1 (1961), 87th Cong., 1st Sess., Part 2 (1961), 87th Cong., 2d Sess., Part 3 (1962), 88th Cong., 1st Sess., Part 4 (1963); *Hearings on S.J. Res. 40 to Protect the Constitutional Rights of the American Indian, Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 89th Cong., 1st Sess. (1965); *Hearings on Rights of Members of Indian Tribes Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs,* 90th Cong., 2d Sess. (1968); *Hearings on Title II of the Civil Rights Act of 1968, Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 91st Cong., 1st Sess. (1969).

strated the failure of state Indian jurisdiction nationally and led to the Indian Civil Rights Act of 1968 and its retrocession provisions. The report[20] of the Montana-North Dakota-South Dakota Joint Advisory Committee to the United States Commission on Civil Rights of August 1974, documents an identical failure of state Indian jurisdiction in those three states.

More recently, as a result of 28 days of hearings at which 250 witnesses testified and 4,500 pages of testimony were taken from tribal, state and local government officials, Task Force IV of the American Indian Policy Review Commission documented the massive failure of Indian jurisdiction in Washington in its "Report on Federal, State and Tribal Jurisdiction."

9. Washington's Assumption of Partial Indian Jurisdiction Violates Federal Policy by Creating a Checkerboard Pattern of Jurisdiction on Washington Indian Reservations.

In addition to violating the Congressional policy in the Enabling Act and adhered to in Public Law 280, Washington's Indian jurisdiction violates another federal Indian policy, the policy of Congress not to saddle Indians with an unworkable checkerboard jurisdictional scheme.

In *Moe, supra,* this Court addressed the argument of the State of Montana and §6 of the General Allotment Act of 1887, 24 Stat. 388, *positively* provided for checkerboard jurisdiction respecting allottees whose allotments had been conveyed by patent in fee. As this Court noted:

> A similar claim was made by the State in *Seymour v. Superintendent,* 368 U.S. 351 (1962), to which we responded:
>
> > '[the] argument rests upon the fact that where the existence or non-existence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State of Federal Government.'
> >
> > Id., at 358.
>
> We concluded that '[s]uch an impractical pattern of checkerboard jurisdiction,' *Id.*, was contrary to the intent embodied in the existing federal statutory law of Indian jurisdiction. See also *United States v. Mazurie,* 419 U.S. 544, 544-555 (1975).
>
> The State's argument also overlooks what this Court has recently said of the present effect of the General Allotment Act and related legislation of that era:
>
> > 'Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished. Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging the Indians to adopt white ways. See §6 of the General Allotment Act, 24 Stat. 390; [citation omitted]. The policy of allotment and sale of surplus reservation land was repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984, now amended and codified as 25 U.S.C. §461 *et seq.*' *Mattz v. Arnett,* 412 U.S. 481, 496 (1973) (Part of footnote 18 incorporated into text).
>
> The State has referred us to no decisional authority—and we know of none—giving the meaning for which it contends to §6 of the General Allotment Act in the

20. Montana-North Dakota-South Dakota Joint Advisory Committee to the United States Commission on Civil Rights, Indian Civil Rights Issues in Montana, North Dakota, and South Dakota (Aug. 1974).

> face of the many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands—statutes discussed, for example, in *McClanahan*, 411 U.S. at 173-179. See also *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971). *Congress by its more modern legislation has evinced a clear intent to eschew any such 'checkerboard' approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area.*

(Emphasis added). 45 L.Ed. 2d 96, at 109-110. Included in the "more modern legislation" referred to by this Court is Public Law 280.

Amici Colville Confederated Tribes and Makah Indian Tribe respectfully request this Court to hold that all of Washington's statutes which attempt to assume civil and criminal Indian jurisdiction pursuant to Public Law 280 are invalid, and to affirm the Ninth Circuit decision.

DATED this 25th day of October, 1977.

Respectfully submitted,

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